UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	Criminal No.: 95-236-A
	)	
v.	)	Violation: 18 U.S.C. § 1001
	)	
EXOLON-ESK COMPANY,	)	
WILLIAM H. NEHILL,	)	
	)	
Defendants	)	

UNITED STATES' OPPOSITION TO DEFENDANT EXOLON-ESK COMPANY'S MOTION FOR A BILL OF PARTICULARS AND OTHER RELIEF

The Government opposes the motion for a bill of particulars submitted by Exolon-ESK Company ("Exolon"), on the grounds that Exolon already has sufficient information to identify the charges against it in order to prepare for trial, to avoid surprise, and to prevent double jeopardy concerns, those being the three reasons why the courts direct the Government to file a bill. The single-count, straightforward Indictment and the Government's telescoping down of relevant discovery materials more than sufficiently educate Exolon as to the nature of the charges -- to the point that the bill Exolon seeks is nothing more than another form of discovery. Based on these factors and relevant legal authority, which Exolon completely ignores despite having notice of this authority from the Government, Exolon's motion should be denied in its entirety and the Government should not be ordered to supply a bill of particulars. Exolon's three additional arguments to limit the Government's reference to certain facts at trial, similarly are unsupported and should be denied.

I. SUMMARY OF PROCEEDINGS AND BACKGROUND

On May 16, 1995, the Grand Jury returned a one-count Indictment (Exh. 1), charging Exolon-ESK Company ("Exolon") and Exolon's former Executive Vice-President, William H. Nehill ("Nehill") with making a false statement to the Defense Logistics Agency ("DLA"), in violation of 18 U.S.C. § 1001. The Indictment specifies that the false statement was contained in a bid dated October 21, 1994 (Exh. 2), submitted by defendants Exolon and Nehill to the Defense Logistics Agency ("DLA") to purchase aluminum oxide fused crude from DLA. And, the Indictment, ¶ 5, excerpts the precise language falsely executed by defendants Exolon and Nehill.

On June 12, 1995, pursuant to Orders governing discovery and inspection in this case (Exhs. 3 & 4), the Government produced to each defendant two accordion-type files, including 1) all documentation pertinent to the October 21, 1994 bid, provided to the Government by either the DLA or defendants, including the bid itself, the October 28, 1994 DLA contract award to Exolon, and the May 4, 1994 DLA Solicitation inviting Exolon to bid; 2) all grand jury exhibits; 3) the grand jury testimony of all Exolon employees who testified, including defendant Nehill, Finance and Tax Manager David Grano, and Secretary Shawn Howard; and 4) reports of interviews for any witnesses questioned by the Defense Criminal Investigative Service ("DCIS") during the investigation, including six Exolon employees and two DLA employees.

On June 16, 1995, counsel for Exolon requested in a letter to the Government additional particularization of the Indictment. Exolon asked, generally, for two categories of evidence: first, the name of each person at Exolon involved in making and submitting the false bid to the DLA (requests 1-5), and second, evidence of the DLA's reliance on the false bid (requests 6-7). See Exhibit "A" to Defendant's Memorandum in Support of Motion ("Def. Mem."). On June 16,

1995, the Government denied Exolon's requests as seeking discovery of the Government's evidence in this case, and advised Exolon of pertinent Fourth Circuit caselaw denying bills of particulars where the Government has opened its files to defendants. (Exh. 5). Contrary to Exolon's assertions in its brief, the Government also agreed to two of three stipulations proposed by Exolon. (Exh. 6).[1/]

II. EXOLON'S REQUEST FOR A BILL OF PARTICULARS SHOULD BE DENIED BASED ON PERTINENT CASE LAW AND EXOLON'S CURRENT AND SUFFICIENT KNOWLEDGE OF ALL RELEVANT FACTS.

The purpose of a bill of particulars is to provide a defendant with information about the nature of the charges against it, if necessary for the defendant to be able to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy. Wong Tai v. United States, 273 U.S. 77, 82 (1927). However, a bill of particulars is not to be used as an investigative tool or as a means to discover evidence of the Government's case prior to trial. See United States v. Automated Medical Labs., Inc., 770 F.2d 399, 405 (4th Cir. 1985). See also United States v. Anderson, 481 F.2d, 685, 690 (4th Cir. 1973); United States v. Allegheny Bottling Co., 1988 WL 32936 (E.D. Va. Feb. 10, 1988). If an indictment is so general that it does not advise the defendant of the act with which it is accused, then it is within the trial court's discretion to grant the defendant's motion for a bill of particulars. But where, as here, an indictment clearly informs a defendant of a single, straightforward charge, a bill of particulars request should be denied. See United States v. Dulin, 410 F.2d 363, 364 (4th Cir. 1969)(where indictment was not vague and charged only one offense, denial of bill of particulars request was proper). See also Hamling v.

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[1] Exolon's Memorandum states: "The government also refused to agree to the other relief sought." (Def. Mem. at 2). This statement is patently untrue.

United States, 418 U.S. 87, 117 (1974) ("[A]n indictment is sufficient if it, first, contains elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."). Accord United States v. Mason, 52 F.3d 1286, 1288 (4th Cir. 1995).

In determining whether a bill of particulars is appropriate in this case, this Court should consider that the information Exolon requests is already available to Exolon from other sources. Even apart from the specific information provided in the Indictment, Exolon already knows the answers, or through reasonable investigation can learn the answers, to the questions posed in its motion. For example, as to Exolon's requests "A" - "C," Exolon knows, certainly better than the Government, which of its officers and employees were involved in the decision to submit the October 21, 1994 bid to the DLA, and prepared and sent that bid to the DLA on Exolon's behalf. If Exolon truly does not know what tasks its own staff performs in relation to DLA bidding, these facts are reflected in both the grand jury testimony and DCIS interview reports of Exolon personnel produced on June 12, 1995. Similarly, Exolon knows from these documents and from its own operations which officers and employees attended a company-wide meeting in February 1994 at which the Indictment of Exolon, defendant Nehill, and Hans Pfingstl, was discussed.[2/] Armed with this knowledge, Exolon will not, as its motion contends, suffer any unfair surprise or prejudice at trial absent further particularization. See United States v. Stroop, 121 F.R.D. 269,

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[2] On February 11, 1994, a federal grand jury empaneled in the Western District of New York returned an indictment against Exolon, Mr. Pfingstl and Mr. Nehill, charging Exolon and Mr. Nehill with violations of the Sherman Act, 15 U.S.C. §1 and with contempt of a Final Judgment issued by the District Court for the Western District of New York, and charging Nehill with obstruction of justice and perjury in connection with his destruction of documents subpoenaed by that grand jury. (Exh. 7).

272 (E.D.N.C. 1988)("A defendant is only entitled to know those central facts which will enable him to conduct his own investigation of the transactions that resulted in the charges against him."). See also United States v. Boutte, 13 F.3d 855, 858 (5th Cir. 1994) (where identification of unnamed persons in the indictment was available to defendant from other discovery, defendant had no cause for a bill of particulars).[3/]

In requests "D" and "E," Exolon clearly seeks discovery of the Government's case, asking the Government to "describe in detail" the materiality of the false statement and the DLA's reliance on it. First, under the case law, the Government is not required to produce to defendants "details" about its affirmative case. See, e.g., Automated Medical Labs, 770 F. 2d at 405 ("A bill of particulars is not to be used to provide detailed disclosure of the government's evidence in advance of trial.") Exolon fails to address this law. Second, Exolon already knows that the DLA awarded Exolon a $54,000.00 purchase contract based on DLA's reliance on the false certifications submitted by Exolon. Not only does the Indictment, paragraph 8, provide Exolon with this information, but the DCIS interview report of certain DLA, Defense National Stockpile ("DNSC") personnel, produced on June 12, 1995, states:

> ... DNSC stated that they always took the stand that they would not award a contract to a company that was under indictment, by Federal Acquisition Regulation clause 209-5, 209-6. DNSC stated they rely heavily on the certifications in the solicitations because it determines whether they can offer the award or not.

March 30, 1995 K. Cattell Report, p. 1. Exolon needs no further information pertaining to the

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[3] Exolon's papers baldly assert that "Defense counsel," not Exolon, "will be surprised at trial..." if the requested particulars are not granted, but fails to support that argument with any discussion of the pertinent case law in the Fourth Circuit. Other than a citation to Wong Tai, the brief is devoid of any cases, despite the fact that the Government, at Exolon's request, sent Exolon a position paper, replete with multiple Fourth Circuit citations, no later than noon on June 16, 1995. See Exh. 5.

materiality of the false statement to prepare for trial, and is not entitled to learn the proposed testimony of DLA witnesses who will attest to their detrimental reliance on Exolon's and Nehill's false statements.

In short, the Government has opened its files to Exolon in this case by producing 1) all documents relating to the October 21, 1994 bid; 2) all documents shown to the Grand Jury; 3) all grand jury testimony of Exolon employees and of former Executive Vice President William H. Nehill; and 4) all DCIS reports of interviews. Hence, Exolon has no need for a bill of particulars. See United States v. Amend, 791 F.2d 1120, 1125 (4th Cir. 1986)(where government maintained an "'open file' policy ... and all information identifying the alleged participants was available" to defendant, denial of bill of particulars request was proper). See also United States v. Schembari, 484 F.2d 931, 935 (4th Cir. 1973)(where government turned over its file to defendant, "underlying objectives" of bill of particulars motion were satisfied); United States v. Smith, 371 F. Supp. 672, 675 (M.D.N.C. 1973)(where government opened its investigative file to defendant court held that "this ... negates the necessity for a bill of particulars."). To order the Government to provide the requested particulars would unnecessarily force the Government to preview its affirmative case and restrict the Government's proof at trial. See United States v. Anderson, 368 F. Supp. 1253, 1262 (D. Md. 1973) ("Premature exposure and unnecessary confinement of the Government's case are certainly significant factors in a court's consideration of particulars"), citing, United States v. Anderson, 481 F. 2d 685 (4th Cir. 1973).

III. EXOLON'S OTHER ARGUMENTS ARE UNSUPPORTED AND WITHOUT MERIT.

Exolon makes three additional arguments which, at best, provide the Court with some

background information on Exolon and its former President, Hans Pfingstl,[4/] and, at worst, are frivolous.

A. The Government Should Not be Precluded from Mentioning other Indictments of or Cases Against Exolon and Mr. Pfingstl.

Exolon argues that the February 11, 1994 Indictment[5/] against Exolon and Mr. Pfingstl "should not be mentioned in any way by the government" because it is irrelevant to the case. Def. Mem. at 7. Exolon cites no case in support of its argument, and fails to narrow the scope of its argument based on its discussions with the Government concerning this matter on June 16, 1995. As the Government told Exolon's counsel both by telephone and in writing, see Exh. 6, the Government recognizes that the charges against Exolon and Mr. Pfingstl -- price-fixing and contempt of a district court's Final Judgement -- are not covered by the DLA certification at issue. See Bid, §1.4a(1)(i) (B) and (C), attached hereto as Exh. 2 at 5.[6/] Nonetheless, these charges may become pertinent in rebuttal or in the cross-examination of Exolon witnesses such as Mr. Pfingstl, Ted Dann (Exolon's Chairman), or any reputation witnesses called by Exolon. See Fed. R. Evid. 608(b)(1) and (2). While the Government does not intend to showcase the antitrust and contempt charges in its affirmative case, it should not be prohibited from testing the credibility of any

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[4] In a recent submission to the DLA, arguing for reinstatement of its purchasing privileges (currently suspended based on the W.D.N.Y. Indictment and false statement at issue), Exolon stated that its Board of Directors suspended Mr. Pfingstl and removed him from all business operations as a result of the false certifications submitted to the DLA. See Excerpt of "Submission on Behalf of Exolon-ESK Company," attached hereto as Exh. 8.

[5] Exolon's brief incorrectly states the year of the February 11th Indictment as "1995."

[6] The February 11, 1994 Indictment of defendant Nehill for obstruction of justice and perjury, conversely, does charge conduct expressly covered by the DLA certifications. See Exh. 7, ¶¶ 30, 36; Exh. 2.

defense witnesses through all legitimate lines of questioning. Any potential prejudicial effect of such references can be cured by a limiting instruction from this Court.

B. The Government's Attorneys Should Not be Precluded from Identifying Themselves as Antitrust Division Attorneys.

Exolon implicitly questions the decision by the United States Attorney's Office in this jurisdiction and the Antitrust Division to assign this matter to those attorneys most familiar with defendants, defendants' counsel, and the aluminum oxide industry, based on their prosecution of the W.D.N.Y. case. Then, Exolon asks this Court to order those attorneys not to identify themselves for the jury, based on an unsupported assertion of "prejudice." As the Government explained to counsel by telephone on June 16, 1995, the only time the Government plans to identify itself is in the opening argument. At that time, the Government agrees to identify the trial attorneys as attorneys from "the Department of Justice" and not to mention the Antitrust Division. However, the Government cannot predict or guarantee that defendants' respective cases or certain lines of questioning never will require those attorneys to acknowledge their involvement in the W.D.N.Y. prosecution. For this reason, the Government opposes this request.

C. The Government Should Not be Precluded from Mentioning that Defendant Nehill has been Indicted for Obstruction of Justice and Perjury.

Exolon joins Defendant Nehill's motion to preclude the Government from mentioning the February 11, 1994 Indictment charging Nehill with obstruction of justice and perjury. These charges expressly are covered by the certification that the DLA requires all offerors to execute, see Exh. 2, and, hence, are directly relevant to proving the falsity and materiality of the statement and the intent of the defendants, as well as to impeaching Mr. Nehill's credibility as a trial witness. The Government's opposition to this argument is fully-briefed in the Government's Opposition to Defendant Nehill's Motion, attached hereto as Exhibit 9.

IV. CONCLUSION

Defendant's request for particulars is not motivated by fear of surprise or any real inability to prepare for trial. Exolon has as much detailed information about the charge against it and about the specific evidence that will be offered to establish those charges, as the Government does. Rather, defendant Exolon seeks through these requests to conduct discovery and to handcuff the Government in the presentation of its case at trial. This use of a bill of particulars is impermissible and the Court should deny defendant's request in its entirety.

Dated: June 30, 1995 Respectfully Submitted,

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